

No. 17-16705

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VALERIE SOTO, as Guardian Ad Litem of
Y.D., a minor, *Plaintiff-Appellant*,

v.

CLARK COUNTY SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from United States District Court - District of Nevada
Case No. 2:16-cv-02063-JCM (Honorable James C. Mahan)

PLAINTIFF-APPELLANT'S OPENING BRIEF

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL
INTERESTS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and 9th Circuit Rule 26.1 Plaintiff-Appellant makes the following disclosures:

The party is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

/s/ Gregory D. Ivie

November 22, 2017

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JURISDICTION AND VENUE

Plaintiff-Appellant, Y.D., a girl with a disability eligible for special education pursuant to the IDEA under the category of autism, filed a Complaint against the CLARK COUNTY SCHOOL DISTRICT on August 30, 2016 alleging discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA"). The District Court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 which afford original jurisdiction of actions arising from federal questions under the Constitution or laws of the United States, including Section 504 and Title II of the ADA.

On July 26, 2017, the U.S. District Court of Nevada granted the Defendant-Appellee's motion to dismiss the complaint without prejudice. On August 25, 2017, Plaintiff-Appellant timely filed its Notice of Appeal of the District Court's final Order that dismissed the complaint to the 9th Circuit Court of Appeals. Accordingly, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

ISSUE PRESENTED ON APPEAL

On July 26, 2017, the U.S. District Court of Nevada granted the Defendant-Appellee's motion to dismiss based on a failure of the Plaintiff-Appellant to exhaust administrative remedies. The main issue on appeal is whether or not the Plaintiff-Appellant exhausted its administrative remedies after settling the IDEA Due Process Hearing Complaint Request through a settlement agreement. The settlement agreement which was executed on the third day of the administrative hearing only settled the IDEA claims. The Court appears to agree with the Defendant-Appellee that the Plaintiff-Appellant needed to complete the entire administrative hearing (with the Impartial Hearing Officer ("IHO") rendering a decision) in order to satisfy the exhaustion requirement. Accordingly, the question on appeal is as follows:

Has the Plaintiff-Appellant exhausted administrative remedies in this matter pursuant to the requirement articulated in 20 U.S.C. § 1415(l)?

STATEMENT OF THE CASE

Plaintiff-Appellant, YD, a girl with a disability eligible for special education pursuant to the IDEA under the category of autism, filed a Complaint against the Defendant-Appellee CLARK COUNTY SCHOOL DISTRICT on August 30, 2016 alleging discrimination under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.* ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.* ("ADA").

On October 3, 2016, Defendant-Appellee filed a Motion to Dismiss on the bases of a lack of subject matter jurisdiction and that the Complaint failed to state a claim upon which relief may be granted. On October 17, 2016, the Plaintiff-Appellant filed an Opposition to Defendant-Appellee's Motion to Dismiss. On October 26, 2016, the Defendant-Appellee filed a Reply to Plaintiff-Appellants' Opposition. On July 26, 2017, the U.S. District Court of Nevada granted the Defendant-Appellee's motion to dismiss without prejudice. Finally, on August 25, 2017, the Plaintiff-Appellant filed a Notice of Appeal to the 9th Circuit Court of Appeals.

Prior to filing the federal court complaint, the Plaintiff-Appellant sought redress for its IDEA claims through the prescribed administrative hearing process. Plaintiff-Appellant filed the due process complaint request on January 22, 2016.

The due process hearing commenced on May 2, 2016 and settled during the third day of the hearing on May 4, 2016. The Settlement Agreement contained the provision: “Parent agrees that all issues set forth in the due process complaint filed on January 22, 2016 have been resolved.” (*See Appellant’s Excerpts of Record - Volume 2, p. 42*). The issues that were within the jurisdiction of the impartial hearing officer (“IHO”) were only IDEA-related. In fact, the IHO made this expressly clear in his “Preparation for Pre-Hearing Conference” Order on March 17, 2016. In “Preliminary Decisions”, the IHO made the following determination:

“1. ADA and Section 504: The DP Complaint refers several times to ADA and Section 504. Please be advised that the Hearing Officer has no jurisdiction regarding ADA or Section 504, and consequently will not be an issue at the Hearing. This preliminary determination will also exclude the issue in the DP Complaint related to discriminatory bussing.” (*See Appellant’s Excerpts of Record - Volume 2, p. 47*).

In their reply to the IHO request for responses to the Preliminary Decisions, counsel for the Plaintiff-Appellant submitted a letter with a copy to the Defendant-Appellee. In responding to the above section regarding ADA and Section 504, Plaintiff-Appellant’s counsel wrote: “Petitioner agrees that the IHO has no jurisdiction over the ADA and 504 in this proceeding. Notwithstanding that, the Petitioner asserts that no rights or remedies are waived under these respective federal laws.” (*See Appellant’s Excerpts of Record - Volume 2, p. 50*).

In the IHO’s “Pre-Hearing Report and Order”, under the section entitled

“The following admissions of fact or stipulations were provided by the parties”:

“c. The IHO determines that the following refer to Section 504 of the Rehabilitation Act of 1973 and although this Hearing Officer has no jurisdiction under IDEA, these issues remain as part of the record if this case is appealed to the Federal District Court, although they will not be entertained at the time of the Hearing in this case.

1) Any alleged violations of Section 504;
2) Any allegation regarding the discriminatory conduct of the District as related to the scheduling of bussing and the instructional hours of school”. (*See Appellant’s Excerpts of Record - Volume 2, p. 54*).

The IHO made it clear and the parties understood that the Section 504 and ADA issues were not within the purview of the IDEA due process hearing. Plaintiff-Appellant’s counsel made it clear in its letter that they were not waiving any rights or remedies under those statutes.

With respect to the settlement agreement, the preamble reads: “WHEREAS Yvette Diaz by and through her parent Valerie Soto filed for a due process hearing on January 22, 2016 pursuant to the Individuals with Disabilities Education Act and its implementing regulations against the Clark County School District concerning the failure to provide a Free Appropriate Public Education in the Least Restrictive Environment during the 2015-2016 School Year... WHEREAS a dispute arose between the Parent and District regarding the provision of a FAPE in the LRE during the 2015-2016 School Year pursuant to the IDEA with respect to FAPE which was the subject of a due process complaint filed on January 22, 2016...”. (*See Appellant’s Excerpts of Record - Volume 2, p. 43*). This language

makes it clear as to the scope of the Settlement Agreement - i.e., issues related to the IDEA. The Settlement Agreement did not expressly contain a provision which limited Plaintiff-Appellant's ability to pursue future complaints under these other federal statutes which provide protection for individuals with disabilities, such as commonly contained in a release or waiver.

In the due process complaint, Plaintiff-Appellant made its allegations of a FAPE denial "including relief provided by Section 504, the ADA, the United States Constitution, and all other Federal laws protecting the rights of children with disabilities, *insofar as such relief is also available under the IDEA.*" (emphasis added). (*See Appellant's Excerpts of Record - Volume 2, p. 60*). An impartial hearing officer presiding over an IDEA administrative hearing may only hear claims under that statute. Accordingly, impartial hearing officers in an IDEA administrative due process complaint proceeding may not hear claims alleging violations of other federal statutes, including Section 504 and the ADA. Plaintiff-Appellant pled the due process complaint in this fashion to make it clear that it was exhausting its IDEA claims and putting the Defendant-Appellee on notice that it intended on possibly pursuing causes of action under these other federal statutes at a later date. The relief in monetary damages that Plaintiff-Appellant is seeking under Section 504 and the ADA is relief that is not available under the IDEA.

SUMMARY OF THE ARGUMENT

The Individuals with Disabilities Education Act, 20 U.S.C. § 1415(*l*) requires exhaustion prior to pursuing Section 504/ADA claims when the plaintiff is seeking relief that is also available under the IDEA. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 1540 (2012). Plaintiffs asserted and settled their IDEA claims and have achieved all relief available under the IDEA through the administrative process. Because the remaining relief requested is not available under the IDEA, Plaintiffs have fulfilled their obligation to exhaust administrative remedies.

Nothing in the IDEA statutorily nor its implementing regulations state that exhaustion requires the completion of an administrative hearing with an IHO rendering a written decision. There is not a 9th Circuit Court decision directly on point; however, there is a 10th Circuit Court decision that is adverse to Plaintiff-Appellant. *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015). A strong dissent by Judge Briscoe in *A.F.* argued that the IDEA can be read in a way that allows mediation to constitute exhaustion. Plaintiff-Appellant argues that the 9th Circuit should adopt the approach of Judge Briscoe in *A.F.*

There are practical and policy reasons for adopting this approach. Practically speaking, to require a parent to exhaust in the manner announced by the majority in *A.F.* would in many cases not make sense. If the parent in an IDEA

administrative hearing process receives an offer from a school district that provides the relief that she is seeking, then it would not make sense to convene a hearing at great time and expense for all of the participants. Additionally, the parent could expose themselves to potential liability for the school district's attorneys fees if they do not accept the "last best offer" or "10 day offer"; proceed to hearing, and do not receive better relief from the IHO's decision. (20 U.S.C. § 1415(i)(3)(D)). Accordingly, the strong policy notions favoring judicial efficiency and economy are implicated in these types of matters. Finally, one of the cornerstones in American jurisprudence is to promote settlement whether through alternative dispute resolution or at any point during the litigation proceedings. Indeed, this is one of the goals of the IDEA itself which is why Congress built in a resolution period and mediation into its statutory framework.

STANDARD OF APPELLATE REVIEW

A dismissal on the pleadings pursuant to Rule 12(c) is reviewed de novo. See *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011); *Peterson v. California*, 604 F.3d 1166, 1169 (9th Cir. 2010); *Dunlap v. Credit Protection Ass'n LP*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005) (per curiam).

ARGUMENT

I. Y.D. exhausted her administrative remedies

The IDEA implementing regulation at 34 CFR 300.516 (e) provides:

"Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under 34 CFR 300.507 and 34 CFR 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act." 20 U.S.C. § 1415(l).

The majority of Circuit Courts have ruled that parents must exhaust their administrative remedies if they allege an injury for which the IDEA provides some form of relief. The 9th Circuit rejected the "injury-centered" approach, an interpretation it previously followed, and adopted a "relief-centered" approach. Under this interpretation, parents must exhaust their administrative remedies only when they seek an IDEA remedy, injunctive relief to alter an IEP or placement, or the enforcement of rights arising out of a denial of FAPE. However, the 9th Circuit held that parents still cannot circumvent the exhaustion requirement by requesting monetary damages stating that "plaintiffs cannot avoid exhaustion through artful pleading". *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 1540 (2012). The Plaintiff-Appellant asserted and settled their IDEA claims and have achieved all relief available under the IDEA through

the administrative process. Because the remaining relief requested is not available under the IDEA, Plaintiffs have fulfilled their obligation to exhaust administrative remedies.

Here, the Plaintiff-Appellant did not attempt to avoid the exhaustion requirement; rather, its IDEA claims were in fact exhausted. An executed settlement agreement was crafted and agreed upon by the parties during the third day of the administrative hearing. This agreement only settled IDEA claims. The IHO made it clear in his Pre-Hearing Order that the hearing only involved IDEA claims. In its opinion and Order, the District Court makes it plain that exhaustion of administrative proceedings requires completion of the hearing: “Rather than exhaust the administrative remedies through an impartial process hearing, plaintiff agreed, on May 4, 2016, to withdraw her request for a hearing in accordance with the settlement agreement.” (*See Appellant’s Excerpts of Record - Volume 1, p. 15*).

However, in *A.G. v. Paradise Valley*, 815 F.3d 1195 (9th Circuit 2017), this Court was presented with a similar procedural situation. In *A.G.*, the parents of a disabled girl appealed the District Court’s ruling of summary judgment in favor of the school district. The parents had filed an IDEA administrative due process complaint. The parents subsequently filed another complaint alleging Sec. 504, ADA and state tort claims. The parties then settled the IDEA claims in a written agreement and the other complaint proceeded in the U.S. District Court of Arizona.

The parties in *A.G.* did not proceed completely through the administrative hearing process. There was no written decision from the IHO in that matter, yet the issue of exhaustion was not raised.

II. Completion of the administrative process includes settlement agreements

Settlement agreements, whether reached through mediation or at any point during the proceedings constitute completion of the administrative process and therefore meet the exhaustion requirement. Although the 9th Circuit does not have a case directly on point, the 10th Circuit issued a ruling that is contrary to the Plaintiff-Appellant's position. *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015).

In *A.F.*, a parent who settled her IDEA claims against a school district had her case dismissed by the U.S. District Court, District of New Mexico for a failure to exhaust her administrative remedies. In a two to one decision, the 10th Circuit affirmed that decision. Judge Gorsuch opined that a successful mediation in and of itself does not satisfy the exhaustion requirement. Further the majority stated that in order to bring a civil action under the IDEA, a party must go through the hearing process and be "... 'aggrieved by the findings and decision' of administrative trial or appellate authorities" in order to seek redress in court. *A.F. v. Espanola Public Schools*.

Thus, the majority in *A.F.* held that in order to exhaust administrative

remedies, a party must complete the entire hearing process and receive a written decision by the IHO (although it recognized that a negotiated mediation agreement might make exhaustion futile in some circumstances). This comports with the decision issued by Judge Mahan in this case. However, Judge Briscoe in her dissent in *A.F.* argued that § 1415(l) of the IDEA can be read in a way that allows mediation to constitute exhaustion particularly when viewed in the context of the entire framework designed by Congress. Judge Briscoe discussed the detailed administrative process in resolving IDEA claims laid out in §§ 1415(f) and (g). She then opined that a mediation agreement (or a settlement agreement) would be considered sufficient to meet the exhaustion requirement because that is what the statute contemplates and encourages and that if a matter is settled through an agreement, then there is nothing to be decided at a hearing. Moreover, Judge Briscoe continued, the party would have to lose at both the due process hearing and administrative review levels before advancing a legitimate claim in federal court which could not have been the intent of Congress. (*A.F. v. Espanola Public Schools.*)

Piggybacking on Judge Briscoe's opinion, there are other practical and policy reasons for adopting this approach. Practically speaking, to require a parent to exhaust by completing the administrative hearing would in many cases not make sense. If the parent in an IDEA administrative hearing process receives an offer

from a school district that provides the relief that she is seeking, then it would not make sense to convene a hearing at great time and expense for all of the participants. Additionally, the parent could expose themselves to potential liability for the school district's attorneys fees if they do not accept the "last best offer" or "10 day offer"; proceed to hearing, and do not receive better relief from the IHO's decision. (20 U.S.C. § 1415(i)(3)(D)). Accordingly, the strong policy notions favoring judicial efficiency and economy are implicated in these types of matters. Finally, one of the cornerstones of American jurisprudence is to promote settlement whether through alternative dispute resolution or at any point during the proceedings. Indeed, this is one of the goals of the IDEA itself which is why Congress built in a resolution period and mediation into its statutory framework. In *Payne*, the competing policy considerations were announced as follows: "The exhaustion provision is designed to 'allow for the exercise of discretion and educational expertise by state and local agencies, afford full exploration of technical educational issues, further development of a complete factual record, and promote judicial efficiency by giving... agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" *Payne*, 653 F.3d at 875. These policy concerns are indeed laudable but they are significantly outweighed by the practical and policy reasons articulated by Judge Briscoe and Plaintiff-Appellant.

CONCLUSION

Respectfully, Plaintiff-Appellant submits that the District Court improperly granted Defendant-Appellee's Motion to Dismiss for failure to exhaust administrative remedies. The settlement agreement executed during the third day of the administrative hearing settled the IDEA claims and served as a valid exhaustion of administrative remedies.

STATEMENT OF RELATED CASES

Pursuant to 9th Circuit Rule 28-2.6, Plaintiff-Appellant submits that there are no known related cases pending in this Court.

RELIEF SOUGHT

The Plaintiff-Appellant respectfully asks that this Court find that the District Court erred in granting Defendant-Appellee's Motion to Dismiss. Further the Plaintiff-Appellant asks that this Court REVERSE the Order of Dismissal and REMAND the matter for further proceedings.

/s/ Gregory D. Ivie

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-16705

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 4,025 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a) (5) and (6).

Signature of Attorney or Unrepresented Litigant
/s/ Gregory D. Ivie

Date: 11/22/2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 22, 2017, an electronic copy of the Brief of Plaintiff-Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. The undersigned also certifies that participants who are registered CM/ECF users will be served via the CM/ECF system.

/s/ Gregory D. Ivie

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